NO. 42396-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS LEE FLOYD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John McCarthy, Judge

No. 10-1-00019-6

BRIEF OF RESPONDENT

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1. Procedure

On January 4, 2010, the State charged defendant, Thomas Floyd, with one count of assault in the second degree, domestic violence. CP 1. The victim of the assault was defendant's wife, Annette Bertan. CP 2-3. An order prohibiting contact between defendant and the victim was entered that same day. Exhibit 70.

On May 24, 2010, defendant was found competent to stand trial. CP 4-5. On June 7, 2010, the State filed a Persistent Offender Notice. CP 6. On June 22, 2010, although defendant was represented by counsel, a hearing was held on defendant's pro se motions in front of the Honorable Ronald Culpepper. 6/22/10RP 3.[1] The court declined to rule on most of

[1] The State will refer to the seven sequentially paginated volumes as RP, the sentencing hearing as SRP and the remaining volumes with the date before "RP".

the motions after finding that most had no merit or were unrelated to the case. 6/22/10RP 6. The court denied defendant's motion to dismiss as to time for trial. 6/22/10RP 7. On September 9, 2010, defendant was again found competent to stand trial. CP 7-8.

Another hearing was held on September 13, 2010, in front of the Honorable Frederick Fleming. 9/13/10AM and PM RP. The court expressed concerns about defendant's mental health. 9/13/10RP 6-7. On November 8, 2010, defendant was again found competent to stand trial. CP 28-29.

On November 18, 2010, defendant was rearraigned in front of the Honorable Linda Lee. 11/18/10RP 2. The State filed an amended information that added five counts of violation of a no contact order- pre sentence. CP 30-33. The court also addressed defendant's motion to represent himself. 11/18/10RP 14. The court engaged in a colloquy with defendant. 11/18/10RP 16-30. Ultimately, the court found that defendant had made a voluntary decision to proceed pro se. 11/18/10RP 30.

On December 2, 2010, the court held a hearing on defendant's motions. 12/2/10RP 3. The Honorable Elizabeth Martin presided. 12/2/10RP. The court denied defendant's motion in regards to his shackles. 12/2/10RP 11.

On December 29, 2010, a hearing was held on defendant's motions concerning double jeopardy, bail, his persistent offender status and to vacate his prior convictions in front of the Honorable Ronald Culpepper.

12/29/10PMRP 4. The court denied defendant's motion to withdraw his 1972 plea to assault in the second degree, and his motion to overturn the 1972 jury verdict on his robbery charge. 12/29/10PMRP 14-15. The court did not rule on defendant's persistent offender status and instead left that question for a later time. 12/29/10PMRP 23-24. The court denied defendant's motion to dismiss for time for trial violations, granted the request to suppress the victim impact statement in the State's case in chief, and then spent a great deal of time going through defendant's discovery requests. 12/29/10PMRP 39, 41, 45-52.

On March 10, 2010, the State filed a second amended information that added a sixth count of violation of a no contact order- pre sentence. CP 98-101. Trial commenced on March 28, 2011, in front of the Honorable John McCarthy. RP 3. When asked if he was ready for trial, defendant responded that he had motions he wanted to present. RP 3. On the second day of trial, defendant again tried to bring motions. RP 114. The court had to remind defendant that they had spent five hours the day before going over defendant's motion. RP 114.

A CrR 3.5 hearing was held during the trial. RP 260- 284. The court found defendant's statements to be admissible. RP 284.

There were multiple disruptions and interruptions by defendant throughout the trial. (*See* Issue 1 below). The court repeatedly had to admonish defendant and warn him that the court may have to reappoint standby counsel. RP 236, 394, 412-13, 543, 571, 573, 576. After

defendant refused to listen to the court and kept trying to refer to and show the jury unmarked evidence that had not been admitted, the court excused the jury and addressed defendant. RP 739-747. After admonishing defendant, making a record of his disruptions and determining that defendant would not follow the court's instructions, the court reappointed counsel. RP 739, 743-747. Defense counsel then made a motion for mistral which was denied. RP 747-749.

Defendant was found guilty as charged on all counts, and the jury answered yes to the domestic violence special verdict on all counts. RP 785-86, CP 219-234.

Sentencing was held on July 1, 2011. SRP 12. The court found that the jury instructions in defendant's 1972 robbery case were incorrect and that the crime could not be considered as a strike offense. SRP 106. The court also found that the 1972 assault in the second degree was not comparable. SRP 106. The court confined its analysis on both counts to defendant's persistent offender status only. SRP 107-108. Defendant's offender score was determined to be a four. CP 513-527. Defendant was sentenced to the high end of 20 months on the assault charge. SRP 118, CP 513-527. The court ordered a suspended sentence on the misdemeanor charges. SRP 118, CP 528-534.

Defendant filed a timely notice of appeal. CP 535.

2. Facts

Victim Annette Bertan and defendant had been married since 2007. RP 149. Ms. Bertan's birthday was January 2 and defendant left her alone on her birthday. RP 151. The next day, January 3, 2010, Ms. Bertan was very upset at defendant. RP 152. She told him she would no longer have sex with him and defendant went "ballistic". RP 152. Defendant leapt out of bed and slapped her in the face. RP 152, 153. Defendant than punched her in the head with his fist. RP 153. Defendant punched the back and sides of her head. RP 153. Ms. Bertan could feel blood coming down her face. RP 153. When she looked in the mirror, she saw blood coming out of her ear. RP 153. Defendant started taking pictures of her and said, "You want more bitch. I've got more for you." RP 154. Ms. Bertan crawled to the bathtub and defendant pulled down the shower curtain. RP 154. Defendant said, "I can give you more bitch. I can give you more bitch. Do you want more?" RP 154. Defendant got wet towels and hit her on the ear with them. RP 155. Defendant said, "Get that fucking blood off your face bitch." RP 155.

Ms. Bertan was crying and twice asked defendant, who had control of the phone, to take her to the hospital. RP 155, 160. Ms. Bertan eventually got out of the house and ran downstairs to the neighbors. RP 156. Defendant tried to pull her back upstairs. RP 156. Ms. Bertan got to her neighbor's door and was on the ground. RP 156. She asked her neighbor to call 911. RP 156.

Grant Griffin is Ms. Bertan's neighbor and called 911. RP 405. Ms. Bertan was at his front door, on the floor, with blood coming out of her left ear. RP 405, 416. She told Mr. Griffin that defendant hit her. RP 406. Defendant told him that Ms. Bertan had kicked him in the groin. RP 406.

Ms. Bertan was in and out of consciousness. RP 156-57. Eventually she was transported to the hospital. RP 158-59. Her shirt was full of blood. RP 189, 190. The bleeding did not stop on its own. RP 164. She had to get seven or eight stitches in her ear. RP 169. Ms. Bertan had bruises and black eyes. RP 196-97. It took her 2-3 months to heal though her hearing is still affected. RP 198.

Lakewood Officer Dustin Carrell was dispatched by 911 to the incident. RP 291. Officer Carrell observed defendant walking in the parking lot area. RP 292. Defendant was agitated and angry. RP 293. As Officer Carrell verified that defendant lived at the apartment where the incident occurred, defendant reached into his pocket. RP 295. Officer Carrell ordered him to remove his hands from his pocket and defendant hesitated before complying. RP 295. Defendant told the officer, "Talk to my sponsor. He's the one who called you." RP 296. When asked his side of the story, defendant replied, "Nothing. She fell." RP 297. Defendant said he and his wife had had a disagreement and that she kicked him in the balls. RP 298. Defendant said he pushed her because she kicked him. RP 298. The officer observed blood on defendant's fingertips. RP 298.

Defendant said he had wiped the blood off his wife's face. RP 299. There was also redness and swelling on defendant's hands. RP 298-99.

Officer Carrell observed that the victim had bandages around her head and that the ones around her ear were already soaked with blood. RP 300, 312. The victim's face had multiple areas that were swollen. RP 300. Her shirt was saturated with blood. RP 309. The victim was very distraught and afraid. RP 301. She told the officer, "He tried to kill me. Please help me." RP 302. Ms. Bertan told the officer that she was upset with defendant and that their argument turned physical when defendant got out of bed and stuck her repeatedly in the face. RP 303. The victim's injuries were consistent with her story and not with just being pushed. RP 311, 315, 316. Ms. Bertan also told Office Jeremy James that defendant had followed her into the bathroom and struck her multiple times. RP 486. She thought defendant was going to kill her. RP 487.

Paramedic Trevor Christensen responded to the incident. RP 365. He observed swelling and bruising around the victim's left eye. RP 369. There was a laceration to her ear and she was bleeding profusely. RP 369, 371. She has a swollen upper lip and the whole left side of her face was swollen and bruised. RP 369. She had bruises to the back of her hand like a defensive injury. RP 370.

Inside the apartment, there were bloodstains on the carpet, blood on the walls and blood soaked towels in the bathroom. RP 300. The curtain rod was on the floor. RP 300.

Defendant testified that the victim kneed him in the groin and he pushed her off or grabbed her arm. RP 622, 658. Defendant also claimed that he was out of it and in a coma. RP 656-57. Defendant said that the victim cut herself with a razor blade and then milked the blood out and spread it on the floor. RP 626, 628-29, 647. Defendant also claimed that she beat her own head against the tub and refused to let him clean up the blood. RP 630. He told the neighbors that his wife was faking it. RP 634. He also claimed he gave his wife the phone but she refused to call police. RP 632.

After the incident, and despite the no contact order, defendant called Ms. Bertan and she reported it to the police. RP 200-01. The calls happened in March and April. RP 201-204. The calls were collect calls from the jail and had defendant's own voice saying his name. RP 200-02, 598. There were five separate calls on March 24, March 27, two on March 30 and on April 8, 2010. CP 98-101. The jail confirmed defendant made calls to Ms. Bertan's phone number. RP 427, 428, 429, On March 3, 2011, defendant called her from Western State Hospital and left her a message, giving her a number so she could call him back. RP 204, 430, 462-63. The number defendant gave Ms. Bertan to call him back was a Western State Hospital number and defendant was admitted there at the time. RP 419, 420, 464.

The no contact order that had been issued in the case was entered into evidence. RP 466, exhibit 70. The order restrains defendant from

contacting Ms. Bertan. RP 468. The order was issued January 4, 2010, under this cause number. RP 468. The order had the signatures of a judge, the defendant and defense counsel. RP 470. The no contact order was in effect when the calls were made. RP 468.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN TERMINATING DEFENDANT'S PRO SE STATUS AFTER DEFENDANT ENGAGED IN SERIOUS MISCONDUCT DURING CLOSING.

The United States Supreme Court recognizes a constitutional right of a criminal defendant to waive assistance of counsel and to represent himself at trial. ***Faretta v. California***, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The Washington Constitution similarly provides that the accused in criminal prosecutions shall have the right to appear and defend in person. Const. art. 1, § 22 (amend. 10); ***State v. Barker***, 75 Wn. App. 236, 881 P.2d 1051, 1053 (1994). The trial court must be careful when a criminal defendant unequivocally requests the right to represent himself; the unjustified denial of this right requires reversal. ***State v. Madsen***, 168 Wn.2d 496, 503, 229 P.3d 714 (2010); ***State v. Breedlove***, 79 Wn. App. 101, 111, 900 P.2d 586 (1995).

Although the constitutional right to self-representation is fundamental, it is neither absolute nor self-executing. ***Faretta***, 422 U.S. at 819; ***Madsen***, 168 Wn.2d at 504; ***State v. Woods***, 143 Wn.2d 561, 585–86,

23 P.3d 1046 (2001), ***State v. Rafay***, 167 Wn.2d. 664, 222 P.3d 86 (2009). "The right of self-representation cannot be permitted to justify a defendant disrupting a hearing or trial, or as a license to a pro se defendant to not comply with relevant rules of procedural and substantive law." ***State v. Fritz***, 21 Wn. App. 354, 363, 585 P.2s 173 (1978)(citing ***Faretta***, 422 U.S. at 834-35 n.46). Defendant's actions can cause his right to self-representation to be terminated. ***State v. Jessup***, 31 Wn. App. 304, 312, 641 P.2d 1185 (1982). If defendant is disruptive or if delay is the defendant's chief motive, the court can terminate self-representation. ***Madsen***, 168 Wn.2d at 509, n. 4. The court can terminate self-representation if a defendant engages in serious and obstructionist misconduct. ***Frtiz***, 21 Wn. App. at 363(citing ***Faretta***, 422 U.S. at 834-35 n.46).

Defendant's behavior throughout the pre-trial hearing and trial was consistently disruptive and delayed the administration of justice. During defendant's rearraignment on November 18, 2010, defendant continually interrupted the judge, and at one point even laughed at the judge. 11/18/10RP 4, 5, 12-14. During the colloquy on defendant's own motion to represent himself, defendant continually had to be reigned in by the court. *See* 11/18/10 RP 16-30. Toward the end of the colloquy, the court had to repeatedly tell defendant to stop talking and listen; the court had to threaten to stop the proceeding. 11/18/10RP 27, 28. Even after the court

made its decision, defendant continued to argue with the judge and the court had to ask the jail to take him out of the courtroom. 11/18/10RP 30.

Throughout the motion on December 2, 2010, defendant continued to interrupt the court. 12/2/10RP 7, 12, 23-24, 29, 31. At the hearing on December 29, 2010, the court had to admonish defendant several times through the course of the hearing. 12/29/10PMRP 21, 22, 34-38.

Defendant's behavior did not improve during trial and contributed to several delays. On the first day of trial, when asked if he was ready for trial, defendant responded that he had motions he wanted to present. RP 3. Defendant then went through several motions that had already been ruled on. RP 4-5. During the hearing, the court continually had to admonish defendant, usually for interrupting. RP 20-21, 24, 31. Defendant also kept repeating himself on issues that had already been addressed. RP 33, 59. Defendant also did not agree with the court that the case was going to trial despite the fact that it had been called for trial. RP 61-63. The court warned defendant that he would rely on defendant's standby counsel if defendant did not know what was going on. RP 35.

On the second day of trial, defendant again tried to bring motions. RP 114. The court had to remind defendant that they had spent five hours the day before going over defendant's motion. RP 114. The court made a record that defendant continued to disrupt the court. RP 118, 121. Despite the fact that defendant had continually objected to continuances, when it actually came time to start the trial, defendant did not want to

proceed. Defendant tried to delay the start of trial by saying he wasn't ready, that he refused to pick a jury, and that he wanted a continuance. RP 117-18, 122. The court had to warn defendant that if he continued to be disruptive and impact the orderly administration of justice, he would not be able to go pro se and defendant's standby counsel would take over. RP 126. Defendant then threatened his standby counsel and the court had to tell him to stop. RP 127-28. Later, defendant remarked in front of the jury that he had been rushed into trial. RP 333.

Throughout trial, defendant interrupted witnesses, the State's argument and the trial. RP 148, 189, 511, 548, 693, 694, 779. Defendant had to be admonished not to interrupt. RP 20-21, 24, 31, 477. Defendant also continually abused his cross-examination time. During cross, defendant repeatedly tried to testify. RP 207, 303, 327, 336, 342, 343, 347, 377-78, 422, 467, 492, 493, 514-15, 524. Defendant had to be admonished repeatedly during cross and in some cases, his cross examination was ended because he was asking inappropriate questions, covering the same thing over and over and not listening to the court's instructions. RP 215,-216, 227, 231, 234, 236, 255, 323, 331, 332, 338, 344-45, 346, 380, 382, 417, 440, 446. Defendant talked to the jury and made inappropriate comments in front of the jury. RP 328, 333, 382, 384, 409. Defendant asked a witness if she has ever been raped and told another witness that there were consequences for perjury. RP 159, 572. Several times, the court had to warn defendant that stand by counsel may

have to take over if defendant could not follow directions and behave appropriately. RP 236, 394, 412-13, 543, 571, 573, 576. The court made a record of defendant's disruptions. RP 573, 691, 739.

After being extremely patient and giving defendant many warnings about his behavior, the court could not tolerate defendant's disruptive behavior on the final day of trial. First, defendant tried to subpoena his dog. RP 701. This caused the court great concern. RP 702. Next, defendant tried to delay his closing. RP 731-32. Defendant then spent his closing argument trying to show the jury exhibits that had not been marked or admitted. RP 733-34, 738-39. The court finally had to excuse the jury and address the parties. RP 739.

The trial court, which was in the best possible position to view what was happening in the courtroom and throughout the trial, made a record that defendant was attempting to scuttle the trial. RP 739. The court then heard from both stand by counsel and the State as to what he should do in this situation. RP 739-742. The court noted that defendant had been doing closing argument for 17 minutes, and the majority of the time had been arguing facts not in evidence and making inappropriate, disruptive statements. RP 743. Even as the court was trying to get defendant to listen and give him one more chance to argue his own closing, defendant continued to interrupt and disrupt the proceedings. RP 743-47. Defendant continued to argue with the court about evidence he wanted to admit, and when the court told defendant he would give him one

more chance to finish his closing, defendant launched into a tirade about the victim withholding evidence. RP 747. Defendant could not follow directions, would not contain his argument to the facts in evidence and would not listen to the court. Defendant's disruptions caused the court to have to excuse the jury and then spend a great deal of time trying to get defendant to cooperate and behave.

Defendant's behavior throughout the proceedings and trial was disruptive. Defendant's behavior during closing was serious misconduct and the last straw. The court warned defendant several times, even before the start of his closing, that he could only use exhibits that were marked and admitted. RP 732. The court in this case bent over backwards to preserve defendant's right to represent himself. When defendant blatantly ignored the court's instructions and admonishments, and committed serious misconduct that severely impacted and ultimately disrupted the trial, the court had the discretion pursuant to case law to terminate defendant's self representation. The right to self representation is not absolute. Defendant's own actions caused the court to have to terminate his self representation. The trial court did not error.

2. THERE WAS SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF VIOLATING A NO CONTACT ORDER WHERE THE STATE PRESENTED SUFFICIENT EVIDENCE THAT DEFENDANT KNOWINGLY VIOLATED THE ORDER.

When reviewing sufficiency of the evidence, the court must view the evidence in the light most favorable to the prosecution and determine if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. ***State v. Rangel-Reyes***, 119 Wn. App. 494, 499, 81 P.3d 157 (2003), ***State v. Green***, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from the evidence. ***State v. Gerber***, 28 Wn. App. 214, 217, 622 P.2d 888 (1981), ***State v. Theroff***, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Both circumstantial and direct evidence are equally reliable. ***State v. Lubers***, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. ***Theroff***, 25 Wn. App. at 593. Credibility determinations are for the trier of fact and

not subject to review. ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

> great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Defendant was charged with violation of a no contact order- pre sentence. The State had to prove that there was a no contact order applicable to defendant, that defendant knew about the order and knowingly violated a restraint provision of the order that prohibited contact with the protected party. RCW 26.50.110, CP 170-207, Instructions 25-30. Defendant only challenges that defendant knew of the existence of the order. Specifically, defendant argues that the State did not prove that the signature on the order is defendant's signature. However, the validity of the order is a question of law that was not raised below and

is not the proper subject of an appeal.[2] Further, the State presented sufficient evidence that defendant knew about the no contact order.

The validity of a no-contact order is a question of law and not an element of the crime. ***State v. Miller***, 156 Wn.2d 23, 31, 123 P.3d 827 (2005). "Questions of law are for the court, not the jury to resolve." *Id.* It is the court's job to determine what orders are valid and to admit those orders that are applicable to the crime charged. *Id.* Defendant's allegation that the signature on the order is not defendant's goes to the validity of the order. Such a challenge should have been presented at the trial level in terms of the admission of the order. Such a challenge was not raised. The State, had a challenge been made to the validity of the order, could have developed a record as to its validity, and the trial court could have then made a ruling. No such record exists because defendant did not raise the validity of the order as an issue. Further, as the validity of the order is not an element of the crime, the State is not required to bring witnesses or

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[2] While a criminal defendant may raise a constitutional error for the first time on appeal, the error must be manifest. RAP 2.5(a); ***State v. McFarland***, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The defendant has the burden to make the required showing of "identify[ing] a constitutional error and show[ing] how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." ***McFarland***, 127 Wn.2d at 333; ***State v. Gregory***, 158 Wn.2d 759, 839, 147 P.3d 1201 (2006); ***State v. McNeal***, 145 Wn.2d 352, 357, 37 P.3d 280 (2002); ***State v. McDonald***, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). Significantly, "[i]f the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." ***McFarland***, 127 Wn.2d at 333.

testimony to verify the validity of the order, such as an expert on defendant's signature. As the validity of the order was not raised below, it is not a proper challenge on appeal. This Court should decline to address it. Defendant's challenge to the sufficiency of the elements is a valid issue for appeal and will be addressed below.

The State presented sufficient evidence for the trier of fact to find that defendant knew about the no contact order. The no contact order was admitted into evidence. RP 466, Exhibit 70. The no contact order had been entered in open court on January 4, 2010. Exhibit 70. The order has the same cause number as the instant case. *Id.* Defendant is listed as the defendant in the caption of the document. *Id.* The order is signed on January 4, 2010, and the incident date for the assault in this case is January 3, 2010. *Id.* The victim is Annette Bertan who is the victim in this case. *Id.* The order is signed by defendant, defense counsel and Judge Culpepper. *Id.* The idea that someone else signed the document, or that defendant was not made aware of the order is not supported by the evidence and is not how case law directs the court to examine the evidence. Looking at the evidence in the light most favorable to the State, there is sufficient evidence that defendant appeared in court on this case the day after the incident date, and that a no contact order was issued that prohibits contact between defendant and the victim in this case. Defendant signed the document as did his defense counsel. There is a reasonable inference that the judge advised defendant of the order in open

court and that his defense counsel, who signed the document, also advised defendant about the order. There is also a hand written notation that defendant could have a civil standby to collect his belongings which lends to the inference that there was some kind of discussion about the document. The document is straightforward, self explanatory and was entered as evidence in this case. There is sufficient evidence that defendant knew of the order.

3. THE TRIAL COURT ERRED WHEN IT FOUND THAT DEFENDANT WAS NOT A PERSISTENT OFFENDER.

The State alleged that defendant's 1972 priors for robbery and assault in the second degree were most serious offenses and made defendant a persistent offender. CP 235-492. The trial court found that neither of the prior offense counted as a strike. SRP 106. The trial court erred in allowing defendant to collaterally attack his 1972 robbery conviction and erred in finding that defendant's 1972 assault in second degree was not comparable. The State asks this Court to reverse the trial court's ruling.

a. The trial court erred in allowing defendant to collaterally attack his 1972 conviction for robbery under the current cause number.

The prosecution does not have the affirmative burden of proving the constitutional validity of a prior conviction before it can be used in a sentencing proceeding. ***State v. Ammons***, 105 Wn.2d 175, 187, 713 P.2d 719 (1986), *see also* ***State v. Irish***, __ Wn.2d __, 272 P.3d 207 (2012). The court in ***Ammons*** stressed the policy reasons behind this rule:

> To require the State to prove the constitutional validity of prior convictions before they could be used would turn the sentencing proceeding into an appellate review of all prior convictions. The defendant has no right to contest a prior conviction at a subsequent sentencing. To allow an attack at that point would unduly and unjustifiably overburden the sentencing court. The defendant has available, more appropriate arenas for the determination of the constitutional validity of a prior conviction. The defendant must use established avenues of challenge provided for post-conviction relief. A defendant who is successful through these avenues can be resentenced without the unconstitutional conviction being considered.

Ammons, 105 Wn.2d at 188. The court in ***Ammons*** reasoned that a defendant has no right to contest a prior conviction at a subsequent sentencing. *Id.* at 188. The court held that a defendant seeking to invalidate a prior conviction must use established avenues of challenge provided for post conviction relief in the state or federal court where the judgment was entered and, if he is successful, he can then be resentenced without the unconstitutional conviction being considered. *Id.*

To be constitutionally invalid on its face, a conviction must show constitutional infirmities on its face, without further elaboration. ***Ammons***, 105 Wn.2d at 188; ***State v. Gimarelli***, 105 Wn. App. 370, 20 P.3d 430, 433 (2001). The defendant bears the burden of establishing the unconstitutionality of his or her prior conviction at a sentencing proceeding. ***State v. Thompson***, 143 Wn. App. 861, 866, 181 P.3d 858 (2008); citing ***In re Pers. Restraint of Williams***, 111 Wn.2d 353, 368, 759 P.2d 436 (1988). When determining facial unconstitutionality, the court will not "go behind the verdict and sentence and judgment to make such a determination." ***Ammons***, 105 Wn.2d at 189; ***Thompson***, 143 Wn. App. at 867-68 (the court will review the "forms alone," and if a determination cannot be made the defendant's claim fails). The face of the conviction can include a plea agreement, but does not include items such as jury instructions. ***In re Thompson***, 141 Wn.2d 712, 718, 10 P.3d 380 (2000). Even if the defendant's claims "appear" to be valid or "may" be unconstitutional, this is not enough to prove facial unconstitutionality. (*See* ***Ammons***, 105 Wn.2d at 189, "Ammons argues that the jury instructions used in his prior trial denied him his constitutional rights. Ammons also appears to raise valid challenges, but the validity cannot be determined facially.") (*See also*, ***Thompson***, 143 Wn. App. at 867-68, "We concede that given the discrepancy between the forms, Thompson's

convictions may be unconstitutional. Like ***Ammons*** though, because a determination cannot be made from review of the forms alone, Thompson's claim fails.")

In the instant case, defendant claimed that his 1972 conviction for robbery was constitutionally invalid. CP 493-507. Specifically, defendant argued that the information and first jury instruction in defendant's 1972 case misstated the elements of the crime. CP 493-507. This argument, however, requires the court to go beyond the face of the judgment and is contrary to case law. Defendant was even informed of this at the December 29 hearing when the court denied defendant's motion to withdraw his 1972 plea, and his motion to overturn the 1972 jury verdict. 12/29/10RP 11, 14. Despite this, the trial court considered this argument, found a jury instruction was in error and as such, found that the conviction was not valid on its face. SRP 105-106. Such an argument and ruling is in violation of case law.

Requiring a defendant to collaterally attack his prior convictions in the court where the conviction was entered promotes consistency in how all future sentencing courts will treat the conviction. When a challenge is made in the court where the conviction was entered, the superior court clerk's file will reflect the determination made by the original trial court. Similarly, if an appellate court grants relief on a personal restraint petition, a copy of the order will be filed in the superior court clerk's file pertaining

to that conviction. Anyone examining the court file will be able to determine the constitutionality of the conviction. In contrast, challenges raised in sentencing courts will be reflected in the superior court file pertaining to the new conviction, rather than the court file pertaining to the prior conviction. This procedure invites inconsistent treatment each time the prior conviction is raised as criminal history in various sentencing courts.

In fact, two different judges in the instant case ruled on the validity of defendant's 1972 robbery conviction. On December 29, 2010, Judge Culpepper reviewed the certified documents pertaining to the 1972 convictions and indicated that they looked valid on their face. 12/29/10PMRP 14, 15. In particular, on the robbery count, the court stated, "This case, 43205, robbery, he apparently went to trial, was found guilty by jury, the judgment says, of robbery. Again, on the face of it I see nothing in particular wrong with this. I'm not going to go behind the face of it today since it's the wrong case number. I'm going to deny the motion to overturn the jury's verdict in that case." 12/29/10PMRP 15. Judge Culpepper made the correct ruling in regards to the facial validity of defendant's 1972 robbery conviction. However, at sentencing, the issue was raised again and Judge McCarthy went behind the face of the document. Judge McCarthy acknowledged that defendant had filed a direct appeal on his 1972 robbery conviction and had never raised the issue he was raising now at sentencing. SRP 105. Despite this and despite

case law to the contrary, the court went behind the face of the document and looked at the jury instructions and concluded that the robbery conviction was invalid on its face. SRP 105-06. Judge McCarthy allowed defendant to turn the sentencing hearing into an appellate proceeding on defendant's 1972 case. Two different judges in the same case looked at defendant's 1972 robbery conviction and handled it differently. This is why defendant must attack his 1972 conviction under that cause number so that it can be treated the same in all cases. Judge Culpepper made the correct decision while Judge McCarthy erred.

Further, Judge McCarthy's ruling is confusing. The trial court stated that he did not agree with defense counsel that defendant's 1972 robbery conviction was not comparable. SRP 106. The State agrees with the trial court that defendant's 1972 conviction for robbery is comparable. In ***State v. Failey***, 165 Wn.2d 673, 677-78, 201 P.3d 328 (2009) (en banc) the court held that robbery as defined in RCW 9.75.010 at the time of defendant's conviction is directly comparable to the current crime of robbery in the second degree, which is a most serious offense. The court in ***Failey*** analyzed the exact same charging language as the instant case and held that it was comparable to a robbery in the second degree. *Id.* ("The conduct charged in the information to which Failey pleaded guilty in 1974 stated that Failey unlawfully and feloniously '[took] personal property from the person or in the presence of Jack Dean Pruitt, against his

will or by means of force or violence or fear of immediate injury to his person.'").

Since there is no difference between the crime, statute, or charging language analyzed by the ***Failey*** court and defendant's case, it is difficult to see how that trial court could find defendant's conviction comparable but also find it facially invalid. The language that the court found to be facially invalid is the exact same language the court found comparable and that is addressed in ***Failey***. Defendant's robbery conviction is valid and comparable as a most serious offense. The trial court's decision finding otherwise should be reversed.

The trial court, in this instance Judge McCarty, erred in considering defendant's collateral attack on his 1972 robbery conviction. The challenge to the 1972 conviction is not proper under this case. Further, the trial court erred in going behind the face of the document and looking at the jury instructions to determine whether or not the conviction was valid. This Court should reverse the trial court's ruling and remand for resentencing.

b. The trial court erred in finding that defendant was not a persistent offender when it found that defendant's 1972 conviction for assault in the second degree was not a most serious offense.

A sentencing court's calculation of an offender score is reviewed de novo. ***State v. Tili***, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). "An offender convicted of a 'most serious offense' must be sentenced to life imprisonment without early release if he has at least two prior convictions for most serious offenses and those prior convictions would be included in his current offender score under RCW 9.94A.525." ***Failey***, 165 Wn.2d at 675. RCW 9.94A.030(32) defines what constitutes a "most serious offense." Subsection (u) also lays out the comparability analysis required for older prior offenses: "[a]ny felony offense in effect at any time prior to December 2, 1993, that is comparable to a most serious offense under this subsection, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a most serious offense under this subsection." RCW 9.94A.030(32)(u). Under RCW 9.94A.030(32)(b), Assault in the Second Degree is listed as a most serious offense.

In the instant case, defendant pleaded guilty to assault in the second degree in 1972. The trial court ruled that this conviction was not comparable as a strike offense.

> On the Assault Second Degree, I don't see any persistent offender cases that have been directly on point on the two issues of whether "willful" is comparable to "intentional" and whether "substantial bodily harm" is comparable to "grievous bodily harm." And so I'm not — at least I am not aware of any persistent offender cases on that particular issue, and I do believe that they are not comparable for purposes of the Persistent Offender Statute.

SRP 106. The trial court did not undertake any sort of comparability analysis. Essentially, the court declined to conduct a comparability analysis because there were no persistent offender cases available on this particular issue. Rather than addressing the cases provided by the State, the court declined to engage in a comparability analysis. This is error.

Assault in the second degree is a most serious offense. The elements of assault in the second degree that defendant pleaded guilty to in 1972, and the elements of the current assault in the second degree are materially the same when analyzed using the comparability analysis in RCW 9.94A.030. In 1972, defendant pleaded guilty to assault in the second degree which said in pertinent part that he "did willfully inflict grievous bodily harm upon the person of Richard Dean Strain." CP 235-

492 -Appendix A. Thus he pleaded guilty to assault in the second degree as defined in 1972 by RCW 9.11.020(3) in pertinent part:

> Every person who, under circumstances not amounting to assault in the first degree [s]hall willfully inflict grievous bodily harm upon another with or without a weapon [s]hall be guilty of assault in the second degree and be punished by imprisonment in the state penitentiary for not more than ten years..."

In 1988, the legislature enacted RCW 9A.36.021 to replace RCW 9.11.020, and for the purposes of this analysis RCW 9.11.020(3) was replaced by RCW 9A.36.021(1)(a), which states:

> A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree [i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm.

Since the Washington State Supreme court has previously held: "the term 'willfully' is not ambiguous...[a]s used in criminal statutes, it means intentionally and designedly," the mental states used in the two statutes (willfully and intentionally) are equivalent. ***State v. Stewart***, 73 Wn.2d 701, 704, 440 P.2d 815 (1968). The lesser crime of assault in the third degree, RCW 9A.36.031(1)(f), is not more comparable. Not only is the degree of harm much less than grievous bodily harm, the much lower mental state ("criminal negligence") makes it clear that assault in the second degree is the comparable offense.

The case law also indicates that "grievous bodily harm" and "substantial bodily harm" are comparable, and in fact, courts will look to case law regarding grievous bodily harm to answer questions regarding the limits of substantial bodily harm. *See* ***State v. Hovig***, 149 Wn. App. 1, 11, 202 P.3d 318 (2009). In ***Hovig***, the court relied on case law regarding grievous bodily harm to hold that a bruise injury can constitute substantial bodily harm. *Id.* at 11-14. Furthermore, the court explicitly rejected the defense contention that substantial bodily injury requires a greater injury than grievous bodily harm. *Id.* at 11-12 ("[the defendant] then asserts that the current second-degree-assault statute requires a greater degree of injury (more than mere pain) than the former statute required...[the defendant's] analysis fails...", parentheses in original).

The serious nature of grievous bodily harm can also be illustrated by examining the types of injuries which the court has held to fall within that definition, which are strikingly similar to injuries included within substantial bodily harm. *See* ***State v. Eaton***, 20 Wn. App. 351, 354, 582 P.2d 517 (1978) (victim of grievous bodily harm suffered fractured cheek bone, fractured jaw, fractured nose, and multiple bruises and contusions); ***State v. Brown***, 17 Wn. App. 587, 593-594, 564 P.2d 342 (1977) (victim had four teeth knocked from a denture and was strangled into unconsciousness).

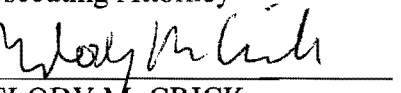
Since defendant's 1972 conviction for assault in the second degree is directly comparable to the current incarnation of assault in the second degree in RCW 9A.36.021(1)(a), it constitutes a most serious offense according to RCW 9.94A.030. The trial court erred when it came to the conclusion that defendant's 1972 conviction for assault in the second degree was not comparable given that the court did not engage in a true comparability analysis and given the case law above that shows how the conviction is comparable. This Court should reverse the trial court's ruling and remand for resentencing.

D. CONCLUSION.

The State respectfully requests this Court affirm defendant's convictions. The State also requests that this Court reverse the trial court's rulings in regards to defendant's persistent offender status and remand for resentencing.

DATED: April 24, 2012.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail or~~ ABC-LMI delivery to the attorney of record for the ~~appellant and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4.24.12 _____
Date Signature

PIERCE COUNTY PROSECUTOR

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